STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 18, 2007
v	No. 270685 Wayne Circuit Court
RAYMOND CHARLES POTTS, Defendant-Appellant.	LC No. 05-011204-01

Before: Murphy, P.J., and Smolenski and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b, two counts of assault with intent to do great bodily harm less than murder, MCL 750.84, and three counts of felonious assault, MCL 750.82. Defendant was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 45 to 75 years for each CSC conviction, ten to fifteen years for each assault with intent to do great bodily harm conviction, and three to six years for each felonious assault conviction. He appeals as of right. We vacate one conviction and sentence for assault with intent to do great bodily harm less than murder and remand for correction of the judgment of sentence, but affirm in all other respects.

I. Facts

Defendant's convictions arose from his assault on his wife over a two-day period in October 2005, in their Detroit home. The victim testified that, on October 18, 2005, defendant accused her of being unfaithful and disrespectful to him because of the way she dressed when going to work. On October 19, 2005, the parties continued their discussion about the victim's alleged unfaithfulness by phone as the victim drove to work. Defendant came to the victim's place of employment during lunch and the victim got into his car. During their continued discussion, the victim punctured her thigh with a dull knife.[1] At approximately 1:15 p.m., defendant took the victim home.

[1] The victim testified that she brought the knife from her classroom, and punctured herself to stop defendant from harming her. She claimed that she had never injured herself before that day.

Once inside, defendant accused the victim of lying, knocked down objects, smacked the victim across the face with an envelope, and directed the victim to undress and "bend over." The victim complied because she "was scared." Defendant removed his leather belt and whipped the victim's buttocks with the belt "at least" eight times. Defendant retrieved three brooms, told the victim to sit down, and repeatedly struck her legs, thighs, and "waist area" with one of the broom handles until it broke. Defendant picked up a second broom and continued beating the victim until the second broom handle broke. Defendant then forced the victim to engage in sex acts. The victim testified that the assault stopped at about 5:40 p.m., because she asked to leave to pick up her children.

On the morning of October 20, 2005, defendant again questioned the victim. Defendant became increasingly angry and the victim, out of fear, told defendant that she had been unfaithful. The victim then left for work and dropped off her oldest child. When the victim called defendant, he instructed her to return home. After arriving at home, defendant continuously questioned the victim and demanded that she name all the men with whom she had been romantically involved. The victim explained that, out of fear, she provided names, although she had not been unfaithful. Defendant dragged the victim into the basement, threw her on the floor, and repeatedly threw large bottles of laundry detergent and bleach at her. He kicked the victim's buttocks, tied her hands behind her back with a computer cord, and subsequently tied her to a pole by using a telephone cord around her neck. Defendant then filled a large bucket with hot water and "threw" it on the victim, while indicating that he knew how to get her to talk. He then went into a room that contained the hot water heater, telling the victim that he was going to elevate the temperature. Defendant thereafter went upstairs, indicating that he was going to boil hot water. Upon his return, defendant filled another bucket with hot water and poured it on the victim. When the victim screamed, defendant threatened to kill her if she woke their sleeping baby.

Defendant went upstairs and returned with a large pot of steaming water and ordered the victim to hold her ankle in the air. He poured some of the steaming water on the victim's ankle, and poured the remaining water over the victim's body. The victim begged for defendant to pour cold water on her burning skin. He acquiesced before going upstairs but, on returning, told the victim that he was boiling another pot of water. He eventually retrieved the boiling water and poured it over the victim's head. The victim screamed and begged for cold water, but defendant refused. He instead poured a bottle of bleach over the victim's body, causing her body to burn. He then retrieved a saltshaker and poured salt on her wounds. At this point, the victim's skin was burning and peeling. Defendant retrieved a mop, and beat the victim on her back with the handle until it broke. He then proceeded to repeatedly whip the victim across her back and sides with an extension cord. Afterward, defendant plugged the extension cord in an outlet and put the other end in the victim's mouth while threatening to pour water on her. Defendant called the victim stupid, untied her, and directed her to go upstairs and take a shower. The victim attempted to shower, but could barely move. Defendant pulled her out of the bathtub, took her into the bedroom, and proceeded to beat her with the plastic handle of a duster until it broke. At approximately 5:00 p.m., the victim's daughter called for a ride home. The victim attempted to get dressed, but sporadically lost consciousness. Ultimately, defendant drove the victim to get her daughter. When the victim said that she needed to go to the hospital, defendant told her that he would go to jail. Throughout the night, defendant repeatedly demanded more information.

On October 21, 2005, defendant allowed the victim to leave for work. The victim called her cousin to meet her and take her to the hospital. The victim was hospitalized for 11 days.

At trial, the defense argued that defendant did nothing to the victim. The defense claimed that the victim was not credible and that her injuries were self-inflicted. The defense also claimed that the sexual acts were consensual.

II. Other Acts

Defendant argues that his convictions should be reversed because evidence of three uncharged prior acts against the victim were improperly admitted, contrary to MRE 404(b). We disagree.

A. Background

Before trial, the prosecution filed notice and moved to admit evidence of defendant's prior acts against the victim that occurred in January 2005 and September 2005, under MRE 404(b). The prosecution sought to admit the evidence as proof of a common system, scheme, or plan for assaulting the victim. The record does not indicate that defendant opposed the motion or that a ruling was made. On the second day of trial, evidence of the prior acts were presented during the victim's testimony, without objection. The victim testified that, following an argument in January 2005, defendant hit her with his hand, knocked her to the ground, and beat her with two broomsticks. He then threatened to kill her as he held a knife at her neck, and later choked her until she lost consciousness. When she regained consciousness, defendant threw her in the bathtub and continued yelling at her. She also testified that, in September 2005, defendant dragged her from the bedroom by her feet, hit her with his hand, knocked her to the ground, put his foot on her head, took off his belt, put it around her neck, and dragged her by the belt into the basement. Once in the basement, defendant threw the victim on the floor, put his shoe on her head, spit on her, urinated on her, and then kicked her.

The victim also testified concerning an assault that occurred in September 2004, to which defendant objected. Following a sidebar, the trial court allowed the testimony. The victim testified that defendant first assaulted her in September 2004, during which he slapped her in the face.

B. Analysis

Because defendant failed to timely object to the evidence of the prior acts that occurred in January 2005 and September 2005, we review this unpreserved issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999). With regard to the evidence of the prior act that occurred in September 2004, we review the trial court's decision to admit the evidence for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). If there is an underlying question of law, such as whether admissibility is precluded by a rule of evidence, we review that question of law de novo. *Id.*

MRE 404(b) prohibits "[e]vidence of other crimes, wrongs, or acts" to prove a defendant's character or propensity to commit the charged crime. MRE 404(b)(1); see also *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). But other acts evidence is

admissible under MRE 404(b) if it is (1) offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice under MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993). In application, the admissibility of evidence under MRE 404(b) necessarily hinges on the relationship of the elements of the charge, the theories of admissibility, and the defenses asserted. *Id.* at 75.[2]

1. Prior Acts in January 2005 and September 2005

In this case, the prosecution offered the other acts evidence as proof of defendant's common scheme or plan in doing an act, which is a proper purpose under MRE 404(b). As our Supreme Court explained in *People v Sabin* (*After Remand*), 463 Mich 43, 63; 614 NW2d 888 (2000), "evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." See also *People v Hine*, 467 Mich 242, 251; 650 NW2d 659 (2002). The *Sabin* Court noted that "[g]eneral similarity between the charged and uncharged acts does not, however, by itself, establish a plan, scheme, or system used to commit the acts." *Sabin*, *supra* at 64. "For other acts evidence to be admissible there must be such a concurrence of common features that the uncharged and charged acts are naturally explained as individual manifestations of a general plan." *Hine*, *supra* at 251. But "distinctive and unusual features are not required to establish the existence of a common design or plan. The evidence of uncharged acts needs only to support the inference that the defendant employed the common plan in committing the charged offense." *Id.* at 252-253.

Defendant has not demonstrated that admission of the evidence constitutes plain error. *Carines*, *supra*. The evidence was not offered to show that defendant had bad character. Rather, it assisted the jury in weighing the witnesses' credibility, particularly where the defense asserted that the victim's injuries were self-inflicted, and it was probative of defendant's common scheme, plan, or system of assaulting the victim. In both the prior acts and the charged crimes, there was a concurrence of common features that defendant utilized against the victim, including dragging her about the house, kicking her, whipping her with a belt, beating her with broomsticks, placing items around her neck, dragging her to the basement, and assaulting her until she lost consciousness. The commonality of the circumstances of the other acts evidence and the charged crimes are sufficiently similar that the jury could infer that defendant had a scheme, plan, or system in doing an act.

Furthermore, contrary to defendant's claim, the evidence was not inadmissible simply because it was prejudicial. The danger that MRE 403 seeks to avoid is that of *unfair* prejudice,

[2] We agree with plaintiff that the propriety of admitting the evidence could also be analyzed under the newly enacted MCL 768.27b, because the trial was in progress on May 1, 2006. MCL 768.27b(6). But contrary to plaintiff's statement, the prosecution's notice of intent was filed pursuant to MRE 404(b), not MCL 768.27b.

not prejudice that stems only from the offensive nature of the crime itself. See *People v Starr*, 457 Mich 490, 499; 577 NW2d 673 (1998). Although the acts described are serious and incriminating, such characteristics are inherent in the underlying crimes for which defendant was accused. The probative value of the other acts evidence was not substantially outweighed by the danger of unfair prejudice. MRE 403.

2. Prior Act in September 2004

We agree with defendant that the evidence of the uncharged act that occurred in September 2004, does not support an inference that defendant employed a common plan in committing the charged offenses. Also, contrary to plaintiff's claim, evidence that defendant slapped the victim in September 2004 did not "explain why the victim stayed in the relationship and did not tell others about the abuse." Nonetheless, we conclude that the error was harmless. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). The victim provided graphic testimony regarding the charged acts. Further, the jury saw photographs of the victim's injuries and the crime scene, and had evidence that was recovered from the home. Also, the victim's cousin testified that after the incidents, the victim's face was swollen, her hands were "twice the normal size," and welts were around her neck. Given the compelling evidence against defendant and the relatively minor prejudice associated with the erroneously admitted testimony, we cannot but conclude that the error did not affect the outcome of the trial. Therefore, defendant is not entitled to relief.

III. Resentencing

We reject defendant's claim that he is entitled to resentencing because a sentencing information report was prepared only for his convictions of first-degree CSC. Because the first-degree CSC convictions were the highest crime class, the trial court was only required to score those offenses. See *People v Mack*, 265 Mich App 122, 127-129; 695 NW2d 342 (2005).

IV. Ineffective Assistance of Counsel

Defendant further argues that he is entitled to resentencing because he was denied the effective assistance of counsel at sentencing when defense counsel failed to object to the scoring of certain sentencing guidelines offense variables.[3] We disagree.

Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of

[3] Defendant does not challenge the trial court's upward departure from the guidelines.

reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Effinger*, *supra* at 69.

"A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A scoring decision "for which there is any evidence in support will be upheld." *Id.* (citation omitted).

A. OV 2

MCL 777.32(1) addresses the lethal potential of weapons possessed or used by the offender. Fifteen points are to be scored for the possession or use of a harmful chemical substance. MCL 777.32(1)(a). "Harmful chemical substance" includes liquids "that through its chemical or physical properties, alone or in combination with 1 or more other chemical substances, can be used to cause death, injury or disease in humans, animals, or plants." MCL 750.200h(i). The trial court's score of 15 points is supported by the evidence that defendant poured bleach on the victim during the course of the criminal transaction.

B. OV 3

MCL 777.33(1)(d) provides that ten points are to be scored if "[b]odily injury requiring medical treatment occurred to the victim." The victim testified that, during the criminal transaction, she was beaten with broomsticks and extension cords, and burned with boiling water. In her impact statement, the victim stated that she suffered burns over her body for which she is still receiving treatment. As a result of defendant's actions, the victim was hospitalized for 11 days. Photographs showing the victim's burns were admitted into evidence. This evidence is sufficient to support the trial court's score of ten points for OV 3.

C. OV 4

MCL 777.34(1)(a) provides that ten points are to be scored if "[s]erious psychological injury requiring professional treatment occurred to a victim." According to the victim's impact statement, the victim stated that she is in counseling. At the sentencing hearing, the victim's father also stated that the victim was receiving counseling. This evidence is sufficient to support the trial court's score of ten points for OV 4.

D. OV 7

MCL 777.37(1)(a) directs a score of 50 points if the victim was "treated with sadism, torture, or excessive brutality." The trial court's score of 50 points is amply supported by the evidence that defendant brutally assaulted, degraded and tormented the victim over a period of two days.

E. OV 8

MCL 777.38(1)(a) directs a score of 15 points if the "victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time

necessary to commit the offense." Defendant argues that because all of the events occurred in the marital home, the victim was never "asported to a place of greater danger." Because this Court has explained that "'asportation' as used in MCL 777.38(1)(a) can be accomplished without the employment of force against the victim," *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003), and the victim was moved by defendant from her place of employment to their home where he committed the offenses, defendant has failed to establish that the trial court abused its discretion in assessing 15 points for OV 8.

F. OV 9

MCL 777.39 directs a score of zero for OV 9 if there are fewer than two victims, and a score of ten if there are two to nine victims. MCL 777.39(1) and (2). The instructions state that "each person who was placed in danger of injury or loss of life" is counted as a victim. MCL 777.39(2)(a). Although there was evidence that the parties' child was in the home on the second day of the criminal transaction, there was no evidence that the child was placed in danger of injury or loss of life. Consequently, OV 9 should not have been scored at ten points, and defense counsel should have objected to the trial court's scoring of OV 9.

If OV 9 is correctly scored at zero, defendant's total OV score decreases from 210 to 200 points. With the corrected OV total, defendant remains in the highest OV level (i.e., level VI for 100+ points), and his guidelines range remains the same (i.e., 225 to 468 months). "Where a scoring error does not alter the appropriate guidelines range, resentencing is not required." *People v Francisco*, 474 Mich 82, 89-90 n 8; 711 NW2d 44 (2006). Therefore, defendant was not prejudiced by defense counsel's failure to object to the scoring of OV 9.

G. OV 12

MCL 777.42(1)(d) directs a score of five points when a "contemporaneous felonious criminal act involving a crime against a person was committed." "[A] felonious criminal act is contemporaneous" if "the act occurred within 24 hours of the sentencing offense" and "the act has not and will not result in a separate conviction." MCL 777.42(2)(a). Defendant asserts that OV 12 should have been scored at zero because he "was convicted of all the charged counts with the exception of domestic violence." Defendant was separately charged with domestic violence but when discussing the verdict form, the prosecutor decided to dismiss the domestic violence charge "to avoid confusion." Because the domestic violence charge did not result in a separate conviction, the trial court could consider it when scoring OV 12, and five points were properly scored.

Because there was evidence to support the trial court's scoring of OV 2, OV 3, OV 4, OV 7, OV 8, and OV 12, defendant cannot establish a claim of ineffective assistance of counsel on this basis. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Further, because defense counsel's failure to object to the scoring of ten points for OV 9 did not affect the appropriate sentencing guidelines range, defendant cannot establish a claim of ineffective assistance of counsel on this basis. *Effinger*, *supra*.

V. Double Jeopardy

Defendant argues that his convictions and sentences for two counts of assault with intent to do great bodily harm less than murder and three counts of felonious assault violate his double jeopardy protections against multiple punishments for the same offense. Because defendant failed to raise this issue below, we review this claim for plain error affecting substantial rights. *Carines*, *supra*.

Initially, we note that plaintiff acknowledges that, based on the prosecutor's concession before the trial court, defendant was incorrectly convicted and sentenced for two counts of assault with intent to do great bodily harm less than murder. During trial, the parties acknowledged that although defendant was separately charged with assault with intent to commit murder and assault with intent to do great bodily harm less than murder, those charges were based on the same conduct and the latter charge was intended only as a lesser offense of the former. Thus, if defendant was found guilty of both counts, he could only be sentenced for one. The jury found defendant guilty of assault with intent to do great bodily harm less than murder as a lesser included offense of assault with the intent to commit murder and under a separately charged count of assault with the intent to do great bodily harm. Defendant was later sentenced to a prison term of ten to fifteen years for each count. Accordingly, we remand for correction of the judgment of sentence to vacate one of defendant's convictions and sentences for assault with intent to do great bodily harm less than murder.

With regard to the remaining convictions and sentences, both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense, including multiple punishments for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Torres*, 452 Mich 43, 63-64; 549 NW2d 540 (1996). But "'[t]here is no violation of double jeopardy protections if one crime is complete before the other takes place, even if the offenses share common elements or one constitutes a lesser offense of the other.'" *People v Colon*, 250 Mich App 59, 63; 644 NW2d 790 (2002), quoting *People v Lugo*, 214 Mich App 699, 708; 542 NW2d 921 (1995).

In *Colon*, *supra* at 63-64, this Court affirmed the defendant's convictions of felonious assault and assault with intent to do great bodily harm less than murder where the defendant beat the victim over the course of an hour and a half, and the distinct beatings were interspersed with the defendant leaving the victim to look for money in the victim's house. In *Lugo*, *supra* at 709, this Court explained that the defendant's dual convictions of felonious assault and assault with intent to do great bodily harm were permissible, although they both arose from the same altercation between the defendant and a police officer, because each conviction was predicated on a separate and distinct act occurring during the altercation.

The evidence in this case similarly shows distinct assaults that supplied the factual basis for defendant's convictions of assault with intent to do great bodily harm less than murder[4] and

[4] "Assault with intent to commit great bodily harm less than murder requires proof of (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997).

three counts of felonious assault.[5] One felonious assault conviction arose out of defendant's actions of beating the victim with two broom handles until they broke before sexually assaulting her on October 19, 2005. Thereafter, on October 20, 2005, defendant hit and kicked the victim, tied her to a pole by tying an extension cord around her neck, and repeatedly scalded her by pouring boiling water on her. These facts supported a distinct act of assault with intent to do great bodily harm less than murder. A second felonious assault arose from defendant's act of pouring bleach on the victim's burns. Thereafter, defendant gathered an extension cord and repeatedly whipped the victim across her back and sides with it, which supported his separate conviction of a third count of felonious assault. Because defendant committed four distinct assaults, the double jeopardy provisions do not prohibit multiple punishments for those separate acts. *Colon*, *supra*. Consequently, there is no plain error.

VI. Excited Utterance

Defendant argues that he was denied a fair trial by the admission of statements made by the victim to her cousin after the alleged incidents ended. We disagree.

Hearsay, which is a statement other than one made by the declarant while testifying at the trial or hearing offered to prove the truth of the matter asserted, is inadmissible at trial unless there is a specific exception allowing its introduction. See MRE 801, MRE 802. The excited utterance exception permits the admission of statements that (1) arise out of a startling event, and (2) are made while the declarant was under the excitement caused by that event. MRE 803(2); *People v Layher*, 238 Mich App 573, 582; 607 NW2d 91 (1999). The focus of the excited utterance rule is the "lack of capacity to fabricate, not the lack of time to fabricate," and the relevant inquiry is one concerning "the possibility for conscious reflection." *People v Smith*, 456 Mich 543, 551; 581 NW2d 654 (1998). The length of time between the startling event and the statement is an important factor to consider in determining admissibility, but it is not dispositive. *Id*. Rather, the key question is whether the declarant was still under the stress of the event, and the trial court is accorded wide discretion in making that preliminary factual determination. *Id.* at 552.

The victim's cousin testified that, on the morning of October 21, 2005, the victim called her, asked to meet her, and subsequently told her that defendant had "burned her up." She indicated that the victim said that defendant had poured hot water on her, tied her up in the basement, poured bleach and salt on her, raped her, and beat her.

Defendant essentially asserts that too much time elapsed between the time of the incidents and the victim's statements to her cousin. We agree with plaintiff that the victim made the statements while she was still under the stress of startling events, i.e., sexual and physical assaults. Although the criminal episode ceased on the early evening of October 20, 2005, the victim explained that defendant grew angrier during the evening and it was not until the

[5] The elements of felonious assault are "(1) an assault, (2) with a dangerous weapon, (3) committed with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999); MCL 750.82.

following morning that she was allowed to leave the house for work. Soon after leaving defendant, the victim called her cousin. The victim's cousin described the victim as "[v]ery scared" and crying, speaking with a "[v]ery shaky, very low" voice, and in excruciating pain. Under these circumstances, there was sufficient evidence that the victim was still under the stress caused by the event. Consequently, the trial court did not abuse its discretion in admitting the evidence.

Affirmed in part, vacated in part, and remanded for correction of defendant's judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Bill Schuette